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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

PHOEBE WILSON DILLON,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

THOMAS E. TOWE
TOWE, BALL, ENRIGHT & MACKEY
2525 Sixth Avenue North
Billings, MT 59101

Attorneys for Petitioner

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Attorneys for Petitioner

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IN THE

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PHOEBE WILSON DILLON,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, PHOEBE WILSON DILLON, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on October 19, 1979. Plaintiff's Motion for Rehearing was denied on January 11, 1980.

OPINIONS BELOW

The Order of the United States Court of Claims granting the Respondent's Motion to Dismiss or for Summary Judgment has not yet been reported and is set out in the

Appendix, infra., at pp. 1a-7a. The Order of the United States Court of Claims denying Plaintiff's Motion for Rehearing is set forth in the Appendix at p. 8a.

JURISDICTION

The Judgment and Order of the United States Court of Claims was entered on October 19, 1979 and its Order denying Plaintiff's Motion for Rehearing was entered on January 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

Petitioner, a member of the Crow Tribe of Indians, claims the United States breached its trust and fiduciary responsibility owed to her as an Indian and seeks the reasonable value of land which she lost because of a breach of that fiduciary responsibility. Upon the filing of her Petition in the Court of Claims, the Respondent (the United States of America) filed a Dispositive Motion (a Motion to Dismiss or for Summary Judgment) on the grounds that the Petitioner's suit is barred, among other reasons, by the principle of res judicata. The United States Court of Claims granted Respondent's Motion dismissing the Petition on the grounds of res judicata and collateral estoppel.

1. Whether an Indian who raises the issue of trust responsibility of the federal government under a Federal Tort Claims Act in District Court is subsequently barred by res judicata and collateral estoppel from raising the issue of trust responsibility in a non-tort action (common law breach of trust) in the Court of Claims.

3. Can a decision of a Federal District Court on a matter over which the Court of Claims has no jurisdiction, namely, a claim under the Federal Tort Claims Act, act as res judicata for a non-tort case in the Court of Claims?

4. Can the United States avoid trust responsibility towards its Indian wards in regard to Indian trust land by claiming it has no duty to litigate?

5. Can Summary Judgment be granted against a party on factual issues where that party's own unrefuted collaborated statement is the only evidence presented?

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

United States Code, Title 25, Section 348 and 349;

Act of June 4, 1920, Section 2 (41 Stat. 751);

United States Code, Title 25, Section 185;

United States Code, Title 28, Section 1346, Section 2674, Section 2679, and Section 2680.

The pertinent provisions of the above statues are reproduced at Appendix B.

Dillon v. Antler Land Company, 341 F.Supp. 731, 1972. Appendix C.

Dillon v. Antler Land Company, Circuit Court of Appeals, Ninth Circuit Decision, 507 F.2d 940, 1974. Appendix D.

Affidavit of Phoebe Dillon. Appendix E.

STATEMENT

The Petitioner, a member of the Crow Tribe of Indians, claimed the United States breached its trust and fiduciary responsibility owed to her as an Indian and seeks the reasonable value of land which she lost because of a breach of a fiduciary responsibility. As stated by the Court of Claims, there is no material dispute concerning the facts. The Petitioner received an Indian Allotment under the Crow Indian Allotment Act of 1920 (Act of June 4, 1920, 41 Stat. 695). Utilizing a scheme prevalent on the reservation, the white tenant leasing her land took advantage of her. In 1955 he refused to advance funds she needed to live on unless she applied for a patent in fee. The fee patent application was prepared at the white tenant's instructions and then before the patent was issued, a written contract was entered into for the white tenant to purchase the land at $7.00 per acre. Petitioner claims the agreement was to pay the appraised value not withstanding the contract if it should be higher. It was appraised at $10.00 per acre but this information was kept from Petitioner until it was too late.

Petitioner's application for a fee patent was approved and the patent was delivered to her on October 3, 1955. Three days later on October 6, 1955 she executed and delivered a Warranty Deed to her white tenant. In spite of Petitioner's protests particularly as to the appraised value, the white tenant insisted that she was bound by her earlier contract at $7.00 per acre. As stated in the Order of the Court of Claims, the transaction by which Petitioner sold her land to her white tenant,

Antler Land Company was both void and voidable. First, the contract was made while the land was still in trust status and therefore void pursuant to 25 U.S.C. §348. If Plaintiff conveyed the land under the mistaken impression she was bound by this contract, the deed was voidable.

Second, Section 2 of the Crow Indian Allotment Act of June 4, 1920, 41 Stat. 751, applicable to the land in question, provides that any conveyance of land by a Crow Indian, whether holding by either a trust patent or a patent fee, to a person, company or corporation owning grazing and agricultural lands above certain acreage limitations shall be void. On the date of the conveyance of Petitioner's lands to her white tenant, Antler Land Company, the company owned lands exceeding the specified acreage limitation. The conveyance was therefore void.

The Petitioner then contacted the Crow Agency Superintendent, the Field Solicitor, the Area Director, U. S. Attorneys, and several private attorneys trying to get someone to help her remedy the situation. After many years, the Bureau of Indian Affairs recommended to the Department of Justice that action should be taken to recover her land. Then the Justice Department decided to bring another case with a similar issue because it would be a better "test case." That case was immediately settled. No one bothered to inform Petitioner that a decision had been made not to bring a lawsuit on her behalf. Finally, on July 20, 1970, she filed action in the United States District Court for the District of Montana against Antler Land Company and other related companies seeking

to recover her land. She also joined the United States Government in a Second Count claiming damages under the Federal Tort Claims Act.

The Federal District Court granted a motion for Summary Judgment in favor of the Defendants including Antler Land Company on the grounds that, although the deed was voidable on the theory of ordinary fraud, voidable as a violation of 25 U.S.C. §348, and void as a violation of Section 2 of the Act of June 4, 1920 (41 Stat. 751), it held that Antler Land Company and its successors in interest had met all the requirements of Montana's Adverse Possession Statute. 341 F. Supp. 734, 739, 743 (1972) (Appendix C). Additionally, acting sua sponte without the benefit of either a Motion to Dismiss or a Motion for Summary Judgment on the part of the Defendant United States, the same Federal District Court dismissed Petitioner's claim against the United States government under the Federal Tort Claims Act.

Petitioner's theory was that the government's failure to act was not only a violation of 25 U.S.C. §185 but was so flagrant a violation of the government's trust responsibility towards its Indian wards that it constituted negligence recognizable under the Federal Tort Claims Act. The District Court rejected that contention by holding first, 25 U.S.C. §185 imposes no mandatory duty upon the United States to "litigate the cases arising out of the dealings of emancipated Indians with fee lands and, second the duties assumed could never be anything but a discretionary duty to which the Federal Tort Claims Act does not apply." 341 F. Supp at 743. Although Petitioner vigorously complained it was caught off guard by the Court's sua sponte action without a genuine

opportunity to address the issue either factually or in legal briefs, her Motion for Reconsideration was denied. The decision was upheld by the Ninth Circuit in Dillon v. Antler Company, 507 F. 2d 940 (1974) (Appendix D); cert. den. 421 U.S. 992 (1975) (Douglas, J. dissenting).

Petitioner then abandoned her tort theory under the Federal Tort Claims Act and filed this claim in the Court of Claims under a common law breach of trust theory. Much to her dismay, the Court of Claims ruled that she had her day in Court in the District Court under the Federal Tort Claims Act and she is barred by res judicata and collateral estoppel from seeking the same damages under a common law breach of trust theory in the Court of Claims. Thus, although two Courts have said Petitioner has been wronged and the deed by which she lost possession of her land is voidable and void, neither Court was willing to grant her a remedy. It appears quite clear that, although not specifically so stated, each Court was in effect telling Petitioner the other Court was the appropriate place to grant her a remedy.

Indeed, the outcome of the case could have an enormous impact. Over 50% of the land on the Crow Indian Reservation has been sold to non-Indians nearly all of it in violation of Section 2 of the Crow Indian Allotment Act of June 4, 1920 (41 Stat. 741). Thus, if Petitioner had succeeded in either Court, virtually every member of the Crow Tribe would have a good claim against the United States Government for failure to enforce the very law that was designed to protect these Indians. The legislative history of the Act of June 4, 1920, however, makes it quite clear that Congress

passed Section 2 for the purpose of avoiding just exactly what happened in this case.

REASONS FOR GRANTING THE WRIT

I.

A PERSON WHO ERRONEOUSLY SEEKS RECOVERY IN THE FEDERAL DISTRICT COURT UNDER THE FEDERAL TORT CLAIMS ACT SHOULD NOT BE SUBSEQUENTLY BARRED FROM SEEKING RECOVERY IN THE COURT OF CLAIMS UNDER A COMMON LAW BREACH OF TRUST THEORY.

In the Federal District Court case, Petitioner was primarily suing Antler Land Company and its successors in interest in an attempt to recover her land. The normal action against the United States for breach of its fiduciary responsibility could not be brought in the Federal District Court because the claim exceeds $10,000.00. 28 U.S.C. §1346 (a)(2). The only possible exception is under the Federal Tort Claims Act, 28 U.S.C. §2671 et seq. Petitioner sought to use this exception but was immediately faced with an exception to the Federal Tort Claims Act, namely, 28 U.S.C. §2680 (a) which provides the Act does not apply to a discretionary function or duty on the part of a federal agency or employee. Petitioner had hoped to avoid this exception to the Federal Tort Claims Act by contending the act or omission complained of was not discretionary but was mandatory either under 25 U.S.C. §185 or because of the seriousness of the trust responsibility owed by the government to its Indian wards. This contention was rejected by the Federal District Court

first, because it found no duty imposed by 25 U.S.C. §185 to litigate the case and, "second, because in any event the duty to sue could never be anything but a discretionary duty to which the Federal Tort Claims Act does not apply." 341 F. Supp at 743. The Ninth Circuit affirmed and merely stated it agreed with the District Court that 25 U.S.C. §185 created no duty to Petitioner.

A common law breach of trust action is quite different than an action under the Federal Tort Claims Act. Here, the exception in 28 U.S.C. §2680(a) relating to discretionary functions does not apply. In fact the whole concept of trust contemplates the exercise of discretion. Although the Federal District Court does not have jurisdiction over such an action where the claim exceeds $10,000.00, the United States Court of Claims clearly does have jurisdiction and has handled many such cases. Menominee v. United States, 101 Ct. Cl. 10 (1944); Navahjo Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966); United States v. Mason, 461 F.2d 1364 (Ct. Cl. 1972), rev'd on other grounds, 412 U.S. 391 (1973). In the latter case Justice Marshall, writing for This Honorable Court, stated in footnote 5:

> The suit was brought under 28 U.S.C. §1941, which gives the Court of Claims jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States,

> or for liquidated or unliquidated damages in cases not sounding in tort." 412 U.S. at 494.

Obviously a breach of fiduciary responsibility under trust law does not sound in tort. If it did there would be a serious problem of jurisdiction.

Commencing in the early part of the Fifteenth Century, actions for breach of trust were brought in the Court of Chancery in England. See e.g. Bogert Trusts 10, 5-17 (5th Ed. Hornbook Series, 1973.) As stated by Bogert:

> A failure to perform any of the duties placed upon [a trustee] by common law, statute, or trust instrument, if loss is caused thereby, will give the beneficiaries or a successor trustee a right to secure from the Court of Equity a decree that the guilty trustee pay to the trust fund the amount of damages suffered. Id. at 562.

The duty of a trustee may or may not include enforcement of claims by litigation. See e.g. 76 Am.Jur. 2d 777, Trusts §566. He must take that care and diligence in administering the trust property that an ordinarily prudent businessman or a reasonable man in the conduct of his own affairs would take towards such property and failure to take such action would constitute a breach of his trust or fiduciary responsibility. Ibid. These same principles of law should apply to federal officials in the exercise of their trust responsibility towards Indian

wards as would be applied to an ordinary fiduciary. Menominee v. United States, 101 Ct. Cl. 10 (1944). Further, the most exacting fiduciary standards should be applied in scrutinizing the government's dealings with the Indians. Navahjo v. United States, 363 F.2d 320 (Ct. Cl. 1966). As aptly stated by the Court of Claims in Mason v. United States, 461 F.2d 1364, 1374 (Ct. Cl. 1972), if the government breaches its trust duty to the pecuniary disadvantage of the Indian wards, "due compensation will be paid by the United States."

Thus, although the same facts are involved and some of the same statutes outlining the responsibility of the government to its Indian wards are involved in both a claim under the Federal Tort Claims Act and a claim in the Court of Claims under the commonlaw breach of trust theory, the two claims are quite different. Whether or not the Court of Claims or This Honorable Court agrees with the Montana Federal District Court or the Ninth Circuit on the interpretation of 25 U.S.C. §185 for the purpose of applying the Federal Tort Claims Act is irrelevant. The federal trust responsibility stands on its own quite apart from 25 U.S.C. §185 or even apart from 25 U.S.C. §348 and 349. The government's fiduciary responsibility to its Indian wards can be traced back to 1831 when Chief Justice Marshall of This Honorable Court stated that the relation of Indian tribes to the United States "resembles that of a ward to his guardian." Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831). Later, This Honorable Court stated in 1886:

> These Indian tribes are the wards of the nation. They

> are communities dependent on the United States... . ...From their very weakness and helplessness, ...there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this Court whenever the question has arisen. United States v. Kagama, 118 U.S. 375, 383-84 (1886); accord. U.S. v. Sandoval, 231 U.S. 28, 45-46 (1913).

This fiduciary responsibility to its Indian wards is reflected in many statutes. See e.g. 25 U.S.C. §348, 25 U.S.C. §185, and Section 2 of the Crow Indian Allotment Act of June 4, 1920 (41 Stat. 741).

Thus neither res judicata nor collateral estoppel apply. The foundation of the doctrine of res judicata or collateral estoppel is that both parties have had their day in Court. As stated by Mr. Justice Harlan, speaking for This Honorable Court in Southern P. R. Co. v. United States, 168 U.S. 1, 48 (1897)

> The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.... Quoted with approval in Johannessen v. United States, 225 U.S. 227,

238 (1912); Accord. Postal Telegraph-Cable Co. v. New Port, 247 U.S. 464 (1918); Sea-Land Services v. Gaudet, 414 U.S. 573 (1974).

Obviously in the instant case the only "right, question, or fact" distinctly put in issue and directly determined by a Court of competent jurisdiction prior to the Petitioner's present filing in the Court of Claims was the question of whether or not she was entitled to recover under the Federal Tort Claims Act on the theory of tort. The rights and the questions put in issue in her subsequent case in the Court of Claims are quite different. They do not sound in tort but in the common law breach of trust. That issue has never been resolved.

Clearly a judgment in one action is conclusive as an estoppel in another action only as to the point or question actually litigated and determined in the original action. McComb v. Frink, 149 U.S. 629 (1893); Radford v. Myers, 231 U.S. 725 (1914); Sea-Land Services v. Gaudet, 414 U.S. 573 (1974). In fact, in the first two cases just cited, res judicata and collateral estoppel were held not to bar an action for breach of trust when the issue in the first lawsuit was breach of contract. In the latter case, Sea-Land Services, This Honorable Court held res judicata and collateral estoppel were not a bar to a maritime wrongful death action even though a personal injury action had been successfully maintained earlier involving the same accident.

The Federal District Court case was strictly limited to a tort claim under the Federal Tort Claims Act. This is verified in the original Complaint (paragraph 2 of

the second claim, Respondent's Exhibit 2). It is verified in the District Court's decision. 341 F. Supp. at 743. And it is verified in the decision of the Ninth Circuit Court of Appeals. 507 F.2d at 944. Had either Court said anything on any issue other than a tort action under the Federal Tort Claims Act it clearly would have exceeded its jurisdiction. A Federal District Court cannot take cognizance of any claim against the United States Government in excess of $10,000.00 unless it is a tort. 28 U.S.C. §1346(b). Thus any part of the decision or any comments of those Courts on any subject other than the tort theory are a complete nullity and legally void. In re Bonner, 151 U.S. 242, 256-57 (1884); New Orleans Mail Co. v. Flanders, 12 Wall. 130 (1870); State ex rel. Cowan v. District Court, 131 Mont. 502, 312 P.2d 119 (1957). A judgment which is void for want of jurisdiction over the subject matter will not, of itself, afford any basis for applying the doctrine of res judicata. Langston v. Nash, 192 Georgia 427, 15 SE 2d 481.

II.

TO DENY RECOVERY TO PETITIONER IN THIS CASE WOULD MAKE A MOCKERY OUT OF THE SACRED TRUST RESPONSIBILITY OF THE UNITED STATES GOVERNMENT TOWARDS ITS INDIAN WARDS.

It is hard to imagine a more obvious case of breach of fiduciary responsibility of the United States Government towards its Indian wards. Because of undenied fraud, fraudulent schemes, illegal contracts, and outright violations of federal law, Petitioner no longer has her trust land. At one point she was even told not to seek

remedy because the "government" was going to do something about it. When the government decided to take another case as a test case they didn't even bother to tell her this or to tell her that the test case had been settled out of Court.

When the Executive Branch let her down, she sought relief in the Judicial Branch only to find that two Federal Courts couldn't agree among themselves as to which should handle the case, both washing their hands of the affair and denying her relief. Admittedly the case could have an enormous impact because over 50% of the land on the Crow Indian Reservation has been sold to non-Indians in violation of Section 2 of the Crow Indian Allotment Act of June 4, 1920. But this is no reason to deny Petitioner her day in Court. The trust responsibility of the Federal Government to its Indian wards is too sacred a concept in American law to be treated in this fashion. See Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831); United States v. Kagama, 118 U.S. 375, 384 (1886); United States v. Sandoval, 231 U.S. 28, 45-46 (1913).

It is further important for this Honorable Court to step in and grant certiorari because of the apparent reluctance of the Court of Claims to assume jurisdiction over this important matter of suits involving the breach of the Federal Government's trust responsibility towards its Indian wards. See Order of the Court of Claims in this case at 6. If there is a reluctance on the part of the Court of Claims to follow what appears to be the mandate of this Honorable Court in the United States v. Mason, 412 U.S. 391, 395 (footnote 5) (1973) the matter should be finally

resolved. Again, the importance of the government's trust responsibility towards its Indian wards is too important to allow Federal Courts to avoid the issue on technicalties on all cases that come before them.

III.

IT IS ERROR TO ALLOW A FEDERAL COURT TO ENTER SUMMARY JUDGMENT AGAINST A PETITIONER WHOSE CLEAR, UNREFUTED, COLLABORATED STATEMENTS MUST BE REJECTED TO REACH SUCH A CONCLUSION.

The Court of Claims disposed of the fraud contention in the instant case by using a presumption. Citing two cases involving an issue of bad faith by government employees, the Court below suggests a presumption that conscientious action by public officials is sufficient to overcome Petitioner's undenied and unrefuted forceful allegations. Neither evil motives nor bad faith are claimed in this lawsuit and the cases cited by the Court are inapplicable. Further, one of the manifest fears of Congress that resulted in the passage of Section 2 of the Crow Indian Allotment Act of June 4, 1920, was that the economic superiority of a few large land barons on the Crow Reservation would unduly affect the rights of individual Crow Allottees. See Exhibits 7 and 10 of the Appendix attached to Plaintiff's brief. The Affidavit of Petitioner outlines just such a situation as Congress feared would happen. Obviously one of the advantages of economic superiority is the influence one exercises over lower echelon governmental officials. To dismiss Petitioner's Affidavit on a presumption without even giving

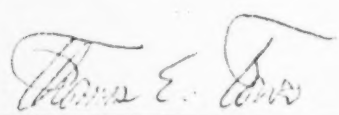
her the opportunity for trial is not only contrary to law but it denies her a day in court and further makes a mockery out of the solemn laws passed by Congress.

Summary Judgment should not be rendered where there is a genuine dispute of fact on material issues. Associated Press v. United States, 326 U.S. 1 (1944) Bishop v. Wood, 426 U.S. 341 (1976) Agosto v. Immigration and Naturalization Service, 436 U.S. 748 (1978). In appraisal of a Petitioner's claim, This Honorable Court must accept Petitioner's version of the facts. Bishop v. Wood, 426 U.S. 341, 347 (1976).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



THOMAS E. TOWE
TOWE, BALL, ENRIGHT & MACKEY
2525 Sixth Avenue North
Billings, MT 59101

Attorney for Petitioner

AFFIDAVIT OF PROOF OF SERVICE

STATE OF MONTANA)
) ss.
County of Yellowstone)

I, THOMAS E. TOWE, an attorney duly authorized to practice law in the State of Montana and the Courts of the United States of America, and a member of the firm of TOWE, BALL, ENRIGHT & MACKEY, 2525 Sixth Avenue North, Billings, Montana, attorneys of record for PHOEBE WILSON DILLON, Petitioner herein, depose and say that on the 7th day of April, 1980, I served a copy of the foregoing PETITION FOR A WRIT OF CERTIORARI to the United States Court of Claims on the party thereto, as follows:

CHARLOTTE R. BELL
Attorney
Land and Natural Resources Division
United States Department of Justice
Washington, D.C. 20530

Attorney for Respondent

Thomas E. Towe
THOMAS E. TOWE

SUBSCRIBED AND SWORN TO before me this 7th day of April, 1980.

Bonnie Coffman Ball
Notary Public for the State of MT
Residing at Billings, Montana
My Commission Expires: 9-24-82

(SEAL)

APPENDIX A

OCT 22 1979

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 410-77

PHOEBE WILSON DILLON	)	
	)	Indian fee patents;
v.	)	res judicata
	)	collateral estoppel
THE UNITED STATES	)	

OCT 19 1979

Thomas E. Towe, attorney of record, for plaintiff. Towe, Ball, Enright & Mackey, of counsel.

Charlotte R. Bell, with whom was Assistant Attorney General James W. Moorman, for defendant.

Before KUNZIG, Judge, Presiding, and BENNETT, Judge.

O R D E R

Plaintiff, a member of the Crow Tribe of Indians, seeks $104,000 in damages against the United States for breach of trust and other fiduciary duties. In 1955, plaintiff was issued a fee patent for 1,040 acres of land in Montana by the Bureau of Indian Affairs. Plaintiff immediately sold the land to a land company for less than its appraised value. Since the sale to the land company at the time was either void or voidable, plaintiff alleges the United States was obligated as a trustee to sue to recover the land for her. The case is before us on defendant's motion to dismiss or for summary judgment on the grounds plaintiff's suit is barred by the statute of limitations, res judicata, lack of jurisdiction and failure to state a claim upon which relief can be granted. We conclude that plaintiff's prior suit and the decision therein, Dillon v. Antler Land Company of Wyola, et al., 341 F.Supp. 734 (D. Mont. 1972), aff'd., 507 F.2d

940 (9th Cir. 1974), cert. denied, 421 U.S. 992 (1975) (hereinafter "Dillon"), bars plaintiff's present suit under principles of res judicata and collateral estoppel. We therefore grant defendant's motion and dismiss the petition.

There is no material dispute concerning the facts. The case concerns 1,040 acres of grazing land in Montana, once part of the Crow Indian Reservation. The United States allotted the land to Dillon in 1923 and 1924 by trust patent under the General Allotment Act, 25 U.S.C. § 348. Plaintiff's father first managed the land for her and leased some of it to Matt Tschirgi. Tschirgi later incorporated under the name of Antler Land Company. In 1949, plaintiff received competency status which allowed her to handle her own leasing negotiations with Tschirgi and she immediately increased her rental income per acre. Tschirgi, however, took advantage of plaintiff's need for money and utilized a scheme prevalent on the reservation whereby leases were made for five years with rentals payable in whole or in part in advance. In 1955, when plaintiff needed money, Tschirgi refused to advance any except on the condition that plaintiff apply for a fee patent so that he might purchase the land from her. Tschirgi gave plaintiff instructions as to how she should prepare her fee patent application and on May 21, 1955, plaintiff entered into a written contract to sell the land to Antler Land Co. for $7,280. Notwithstanding the purchase price of $7 per acre in the contract, Tschirgi promised to pay plaintiff whatever the appraised value of the land turned out to be. Dillon, supra, 341 F.Supp. at 738. On Augus 23, 1955, the land was appraised at $10,400, or $10 per acre.

Plaintiff's application for a fee patent was approved, a patent was issued on September 19, 1955, and delivered to plaintiff on October 3, 1955. On October 6, 1955, she executed and delivered a warranty deed to Antler Land Co. Plaintiff, however, asked to know the appraised value of the property which Tschirgi refused to reveal, insisting plaintiff was

bound by the contract of May 21, 1955, with its price of $7 per acre. Tschirgi was adamant in his refusal to pay plaintiff the land's appraised value, compelling plaintiff to turn to other individuals for help, including the Crow Agency Superintendent and the Field Solicitor, without success.

Two important factors surrounding plaintiff's land sale to Antler Land Co. made the transaction both void and voidable. First, the contract of May 21, 1955 was made while the land was still in trust status and therefore void pursuant to 25 U.S.C. § 348. While Tschirgi could have freely negotiated with plaintiff for sale of the land after a fee patent was issued, he could not do so on the strength of the void contract of May 21, 1955. If plaintiff conveyed the land under the mistaken impression she was bound by the May 21, 1955 contract, the deed was voidable.

Second, section 2 of the Crow Indian Allotment Act of June 4, 1920, ch. 224, 41 Stat. 751, applicable to the lands in question, provides that any conveyance of land by a Crow Indian, whether holding by either a trust patent or a patent fee, to a person, company or corporation owning grazing and agricultural lands above a certain acreage limitation shall be void. On the date of the conveyance of plaintiff's lands to Antler Land Co., the company owned lands exceeding the specified acreage limitation. The conveyance was therefore void.

Believing she had been wronged, Dillon contacted several attorneys and U.S. Government officials with the hope of having the United States sue to recover the land and quiet title in trust for her. She was, however, unsuccessful in her efforts and finally on July 20, 1970, plaintiff filed an action in United States District Court for the District of Montana against Antler Land Co., other related companies, and the United States.

Plaintiff's action in the District Court sought to have the contract of May 21, 1955 and the deed to Antler Land Co. declared void on the two grounds mentioned above and for reasons of fraud. Dillon's claim relating to the United States maintained the Government, by failing to recover the lands for Dillon, breached a duty to plaintiff required by 25 U.S.C. § 185 which provides, inter alia, that when an Indian is allotted land, "the agent and superintendent of such Tribe shall take such measures, not inconsistent with the law, as may be necessary to protect such Indian in the quiet enjoyment of the lands so allotted to him."

With respect to the issue of the validity of the land conveyance, the District Court on motion for summary judgment determined that the conveyance from Dillon to Antler Land Co. was indeed void, for the reasons discussed above. Dillon, 341 F.Supp. 734 at 739-41. But even though the conveyance was void, because Antler Land Co. and its successors in interest had met all the requirements of Montana's adverse possession statute, "defendants [i.e. Antler Land Co.] have acquired a title by adverse possession as against the plaintiff [Dillon]. 341 F.Supp. at 743.

As to the issue of the United States' alleged duty to sue on plaintiff's behalf, the District Court rejected plaintiff Dillon's contentions. The District Court first noted that the issuance of a fee patent to Dillon had specific legal ramifications:

> The issuance of the fee patent had a broader effect than merely to free plaintiff to sell her land--it freed the United States from its trustee duties and altered the relationship of the land and plaintiff to the State of Montana. 341 F.Supp. at 741.

A decision of the United States to sue for Dillon was one solely within the discretion of the Attorney General of the United States and the court was without power to compel the exercise of such discretion.

The District Court also rejected Dillon's argument that 25 U.S.C. § 185, supra, imposed a duty upon the United States to litigate on her behalf. The District Court succinctly stated:

> 25 U.S.C. § 185 does not, in light of the previously quoted language from the General Allotment Act and the Crow Act, continue forever the trusteeship of the United States over the fee lands of emancipated Indians and does not impose a duty in the United States to litigate cases arising out of the dealings by Indians with their patent-in-fee lands. (footnote omitted) 341 F.Supp. at 742.

In view of the above, it is clear the issue of whether the United States had a duty under 25 U.S.C. § 185 to sue on Dillon's behalf was squarely addressed by the District Court. Moreover, in a motion for reconsideration before the District Court plaintiff has conceded that: "Petitioner [Dillon] did suggest that in determining whether the United States has a duty to litigate under 25 U.S.C. § 185, it should consider the fiduciary responsibility to its Indian wards."

Dillon appealed the District Court's decision which was affirmed. Dillon, 507 F.2d 940 (9th Cir. 1974), cert. denied, 421 U.S. 992 (1975).

Dillon filed the instant action in the Court of Claims on August 4, 1977. Of course this suit concerns the same conveyance of property by the same individual, Dillon, as was before the District Court. Defendant herein, the United States, was also a defendant in the District Court suit. Once again Dillon's main contention is that the United States has failed to act to recover her lands in violation of its fiduciary relationship, its trust duties, and its responsibilities under 25 U.S.C. § 185. Dillon additionally alleges, as she did before the Montana District Court, that the United States made an appraisal of her land but "conspired to keep such appraisal" from Dillon until the transaction was complete.

Though it appears there may be a substantial jurisidictional question present, it is not necessary to address it directly for:

> When our jurisdiction is denied by a party, we are not required to decide whether we have jurisdiction or not if the case is submitted on cross motions for summary judgment, with documents, and we can see from these documents that the claim is without substance on its face. Monnett v. United States, 190 Ct.Cl. 1, 419 F.2d 434 (1969), cert. denied, 400 U.S. 846 (1970).

Small v. United States, 200 Ct.Cl. 11, 17-18, 470 F.2d 1020, 1024 (1972).

This case may be decided on straightforward grounds of res judicata and collateral estoppel. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 593 (1974); Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948); Tanker Hygrade No. 18, Inc. v. United States, et al., 208 Ct.Cl. 488, 526 F.2d 805 (1975).

Plaintiff in this case asserts the same set of facts and the same statutory provisions as were presented in Dillon v. Antler Land Company of Wyola, et al., 341 F.Supp. 734 (D. Mont. 1972), aff'd, 507 F.2d 940 (9th Cir. 1974), cert. denied, 421 U.S. 992 (1975). Plaintiff's complaint before this court alleges the United States and its officers and agents have wilfully omitted and neglected a duty required of them by the laws and treaties of the United States, especially of the Act of June 14, 1862, 25 U.S.C. § 185 (12 Stat. 427).

Plaintiff attempts to escape application of res judicata and collateral estoppel by insisting her claim before the District Court was limited to defendant's liability under the Federal Tort Claims Act. We do not think the issue was so narrowly decided for the District Court found, as emphasized by the Court of Appeals, 507 F.2d at 944, that the Crow Allotment Act, 25 U.S.C. § 185:

> . . [I]mposes no duty upon the United States to litigate the cases arising out of dealings of emancipated Indians with fee lands.

Moreover, as plaintiff recognizes, in her motion for reconsideration before the District Court, "Petitioner did suggest

that in determining whether the United States has a duty to litigate under 25 U.S.C. § 185, it should consider the fiduciary responsibility to its Indian Wards." Yet the motion for reconsideration was denied. We believe these circumstances and the history of the prior litigation contained herein, show plaintiff's claims have been fully litigated and decided against plaintiff.

As to plaintiff's allegation that the United States made an appraisal of her land, but conspired to keep the appraisal from her until the transaction was complete, the allegation must face the presumption that public officials act "conscientiously in the discharge of their duties." Librach v. United States, 147 Ct.Cl. 605, 612 (1959). A finding to the contrary requires well-nigh irrefragable proof tantamount to evidence of some specific intent to injure the plaintiff, malice or conspiracy. Kalvar Corp., Inc. v. United States, 211 Ct.Cl. 192, 543 F.2d 1298 (1977). Plaintiff's bare allegation of conspiracy, alone, is insufficient to raise a factual question.

Accordingly, IT IS THEREFORE ORDERED, upon consideration of the parties' submissions and other papers, but without oral argument that defendant's motion is granted and plaintiff's petition is dismissed.

BY THE COURT

OCT 19 1979

Robert L. Kunzig

ROBERT L. KUNZIG
Judge, Presiding

Appendix 8a

JAN 14 198

IN THE UNITED STATES COURT OF CLAIMS

No. 410-77

PHOEBE WILSON DILLON

v.

THE UNITED STATES

Before KUNZIG, Judge, Presiding, and BENNETT, Judge.

ORDER

This case comes before the court on plaintiff's motion, filed November 5, 1979, for rehearing under Rule 151(b), with reference to the order entered herein on October 19, 1979, dismissing the petition. Upon consideration thereof, without oral argument,

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied.

JAN 11 1980

BY THE COURT

Robert L. Kunzig
Judge, Presiding

APPENDIX B

25 USC § 348

§ 348. Patents to be held in trust-Descent and partition.

Upon approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made ... and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.... (Feb 8, 1887, c 119, §5, 24 Stat. 389; Mar 3, 1901, c 832, §9, 31 Stat. 1085)

25 USC § 349

§ 349. Patents in fee to allottees

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act /25 USC § 348/, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; ... Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States.... (Feb. 8, 1887, c 119, §6, 24 Stat. 390; May 8, 1906, c. 2348, 34 Stat. 182.)

Act of June 4, 1920, Sec. 2
(41 Stat. 751)

SEC. 2 No conveyance of land by any Crow Indian shall be authorized or approved by the Secretary of the Interior to any person, company, or corporation who owns at least six hundred and forty acres of agricultural or one thousand two hundred and eighty acres of grazing land within the present boundaries of the Crow Indian Reservation, nor to any person who, with the land to be acquired by such conveyance, would become the owner of more than one thousand two hundred and eighty acres of agricultural or one thousand nine hundred and twenty acres of grazing land within said reservation. Any conveyance by any such Indian made either directly or indirectly to any such person, company, or corporation of any land within said reservation as the same now exists, whether held by trust patent or by patent in fee shall be void and the grantee accepting the same shall be guilty of a misdemeanor and be punished by a fine of not more than $5,000 or imprisonment not more than six months or by both such fine and imprisonment.

25 USC § 185

§ 185. Protection of Indians desiring civilized life.

Whenever any Indian, being a member of any band or tribe with whom the Government has or shall have entered into treaty stipulations, being desirous to adopt the habits of civilized life, has had a portion of the lands belonging to his tribe allotted to him in severalty, in pursuance of such treaty stipulations, the agent and superintendent of such tribe shall take such measures, not inconsistent with law, as may be necessary to protect such Indian in the quiet enjoyment of the lands so allotted to him. (R.S. §2119).

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 of the Internal Revenue Code of 1954.

As amended Apr. 25, 1949, c. 92, § 2(a), 63 Stat. 62; May 24, 1949, c. 139, § 80(a, b), 63 Stat. 101; Oct. 31, 1951, c. 655, § 50(b), 65 Stat. 727; July 30, 1954, c. 648, § 1, 68 Stat. 589; July 7, 1958, Pub.L. 85–508, § 12(e), 72 Stat. 348; Aug. 30, 1964, Pub.L. 88–519, 78 Stat. 699, Nov. 2, 1966, Pub.L. 89–719, Title II, § 202(a), 80 Stat. 1148; July 23, 1970, Pub.L. 91–350, § 1(a), 84 Stat. 449.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

As amended Sept. 21, 1961, Pub.L. 87-258, § 1, 75 Stat. 539; July 18, 1966, Pub.L. 89-506, § 5(a), 80 Stat. 307.

Section 2 of Pub.L. 87-258, 75 Stat. 539 provided that: "The amendments made by this Act shall be deemed to be in effect six months after the enactment hereof but any rights or liabilities then existing shall not be affected."

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741–752, 781–790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

As amended July 16, 1949, c. 340, 63 Stat. 444; Sept. 26, 1950, c. 1049, §§ 2(a) (2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub.L. 86–168, Title II, § 202(b), 73 Stat. 389.

A P P E N D I X C

Phoebe Wilson DILLON, Plaintiff,

v.

ANTLER LAND COMPANY of Wyola, a Montana corporation, et al., Defendants.

Civ. No. 891.

United States District Court,
D. Montana,
Billings Division.

April 14, 1972.

As Amended May 2, 1972.

Proceedings on defendants' motions for summary judgment in action by Indian to set aside conveyance of Indian lands. The District Court, Russell E. Smith, Chief Judge, held that where Crow Indian conveyed lands in 1955 after receiving patent and facts bearing on her claim of fraud were known as early as 1956 with other facts being known to Indian as they developed, any right Indian had to avoid deed on ground of fraud, or because of statute making null and void any contract to convey lands entered into prior to patent or to avoid deed by reason of violation of Crow Act provision limiting amount of acreage within reservation that could be held by non-Indian was barred by state statute of limitations, and that United States' failure to act to set aside conveyance of Indian lands made by Crow Indian did not entitle Indian to bring action for damages against United States.

Motions granted.

1. Federal Civil Procedure ⇨2533

Motion to dismiss Indian's action for damages based on government's failure to take action on her behalf with respect to recovering land transferred by Indian would be considered as motion for summary judgment and court would consider matters outside pleadings. 25 U.S.C.A. § 185; Fed.Rules Civ.Proc. rule 12(b), 28 U.S.C.A.

[F.2d 955, [5 Cir., Opinion dated March 1, 1972].

2. Federal Civil Procedure ⇐2551

On defendants' motions for summary judgment, court considers defendants' answers to interrogatories and request for admissions where favorable to plaintiff, plaintiff's answers to interrogatories and requests for admissions, affidavit of plaintiff in toto, and affidavits filed on behalf of defendants to extent they are not controverted.

3. Indians ⇐14

Finding that Indian was competent was not one merely implied from issuance of fee patent but was considered finding made by superintendent of reservation and approved by area director. Act June 4, 1920, 41 Stat. 755.

4. Indians ⇐15(1)

Where lessee of Indian land advised Indian that patent would not be issued if he were shown to be involved and Indian failed to disclose in application for patent that Indian had been requested to apply for patent in fee and that contract to sell land was in existence, deed from Indian to lessee issued after grant of patent application was voidable for ordinary fraud. 25 U.S.C.A. § 348; Treaty with the Crow Indians May 7, 1868, 15 Stat. 649.

5. Indians ⇐15(1)

Where lessee of Indian land advised Indian that patent would not be issued if he were shown to be involved and Indian failed to disclose in application for patent that Indian had been requested to apply for patent in fee and that contract to sell land was in existence, deed from Indian to lessee issued after grant of patent application was voidable for violation of statute making null and void any conveyance of Indian land prior to issuance of patent. 25 U.S.C.A. § 348; Treaty with the Crow Indians May 7, 1868, 15 Stat. 649.

6. Indians ⇐15(1)

Where grantee from Crow Indian already owned more than 1,920 acres of grazing land within reservation, deed was void. Treaty with the Crow Indians May 7, 1868, 15 Stat. 649; Act June 4, 1920, 41 Stat. 751.

7. Indians ⇐15(1)

Crow Indian's contract to convey land was void where contract was executed before issuance of patent. Treaty with the Crow Indians May 7, 1868, 15 Stats. 649; 25 U.S.C.A. § 348.

8. Indians ⇐15(1)

Even though contract which covered sale of Indian lands and which was executed prior to grant of patent was void, contract did not prevent Crow Indian and proposed lessee from dealing with land after issuance of fee patent provided there was new meeting of mind and subsequent deed resulting from such dealings was not product of contract. Treaty with the Crow Indians May 7, 1868, 15 Stats. 649; 25 U.S.C.A. § 348.

9. Indians ⇐15(1)

If grantee from Indian had exerted economic pressure on Indian to secure contract covering sale of Indian lands in violation of congressional policy and secured deed by misrepresentations or by reason of Indian's mistaken belief that she was obliged to perform contract, deed was illegal fruit of illegal contract. Treaty with the Crow Indians May 7, 1868, 15 Stat. 649; 25 U.S.C.A. §§ 348, 349.

10. Indians ⇐15(1)

Provision of Crow Act limiting acreage within reservation that could be held by non-Indian was a limitation on power of buyer to buy such lands. 25 U.S.C.A. §§ 348, 349.

11. Indians ⇐27(4)

Where Crow Indian conveyed lands in 1955 after receiving patent and facts bearing on her claim of fraud were known as early as 1956 with other facts being known to Indian as they developed, any right Indian had to avoid deed on ground of fraud, or because of statute making null and void any contract to convey lands entered into prior to patent or to avoid deed by reason of violation of Crow Act provision limiting amount of acreage within reservation that could be held by non-Indian was barred by state statute of limitations. Treaty with the Crow Indians May 7, 1868, 15

Stat. 649; Act June 4, 1920, 41 Stat. 751; 25 U.S.C.A. §§ 348, 349.

12. Indians ⇨27(5)

Where Indian had been declared competent and had obtained patent to land, Indian, by joining United States as party defendant, could not force United States to accept role of party plaintiff or equate her rights with rights which United States might assert if it chose to assert them. Treaty with the Crow Indians May 7, 1868, 15 Stat. 649; Act June 4, 1920, 41 Stat. 751; 25 U.S.C.A. §§ 348, 349.

13. Indians ⇨14

Issuance of fee patent to Indian had broader effect than merely to free Indian to sell her land, and freed United States from its trustee duties and altered relationship of land and Indian to state of Montana. Treaty with the Crow Indians May 7, 1868, 15 Stat. 649; Act June 4, 1920, 41 Stat. 751; 25 U.S.C.A. §§ 348, 349; Montana Enabling Act, 25 Stat. 676; Const.Mont.Ord. No. 1.

14. Indians ⇨27(5)

Whether United States should assert action to set aside Indian's deed which was voidable for fraud and violation of statutes applicable to conveyances by Crow Indian involved exercise of discretion by attorney general and Indian who was barred from bringing such action because of statute of limitations could not make such decision for United States by joining United States as defendant and could not empower court to make such decisions. Montana Enabling Act, 25 Stat. 676; Const.Mont. Ord. No. 1; Treaty with the Crow Indians May 7, 1868, 15 Stat. 649; Act June 4, 1920, 41 Stat. 751; 25 U.S.C.A. §§ 348, 349.

15. Indians ⇨10

United States is not under any duty to litigate all title problems which may be created by emancipated Indian dealing with lands which are subject to a state law. 25 U.S.C.A. § 185.

16. Adverse Possession ⇨42

Where defendants occupied land which they claimed to legally own since 1955, by virtue of deed from Indian, used lands for purposes for which they were suited, paid all taxes legally levied and assessed, placed of record, during period of 1955 to 1967 patent and six other documents disclosing their claims, enclosed land by fence, and facts bearing on any fraud were known to Indian, who had been granted patent, as early as 1956, defendants acquired title by adverse possession. R.C.M.1947, §§ 93-2510, 93-2511.

17. Indians ⇨10

Fact that grantees from Indian had acquired title to land by adverse possession would not affect right of United States to enforce policy expressed by Crow Act limiting amount of acreage that could be owned by non-Indian within reservation. Act June 4, 1920, 41 Stat. 751.

18. Limitation of Actions ⇨101½

Time during which Indian attempted to get United States to set aside conveyance made by Indian of Indian lands did not toll state statute of limitations.

19. Indians ⇨27(1)

United States' failure to act to set aside conveyance of Indian lands made by Crow Indian did not entitle Indian to bring action for damages against United States. 25 U.S.C.A. § 185; 28 U.S.C.A. §§ 1346(b), 2680(a).

Towe, Nealy & Ball, Billings, Mont., for plaintiff.

Hibbs, Sweeney & Colberg, Crowley, Kilbourne, Haughey, Hanson & Gallagher, Otis L. Packwood, U. S. Atty., Billings, Mont., for defendants.

OPINION AND ORDER

RUSSELL E. SMITH, Chief Judge.

In October 1955 plaintiff, a Crow Indian, sold 1040 acres of land to the Antler Land Company of Wyola (hereafter Antler Land). In June 1970 she filed this action. In her first claim she seeks to vest the title to the land in herself or in the United States as her trustee and to recover rents and profits.

In support of the first claim, three theories, all stemming from plaintiff's status as an Indian, are urged: first, that there was fraud which vitiated the patent from the United States to plaintiff and the deed from her to Antler Land; second, that while the land was in trust status plaintiff executed a contract to convey it which, under the provisions of the General Allotment Act,[1] made the subsequent deed invalid; and third, that Antler Land on the date of the delivery of the deed owned lands in excess of the acreage limitations contained in Section 2 of the Crow Indian Allotment Act.[2] Motions for summary judgment are directed to the first claim.

[1] In her second claim plaintiff seeks to recover $33,000.00 in damages, alleging that the agents of the United States, by refusing to take action in her behalf with respect to the 1040 acres, breached the duties enjoined upon them by 25 U.S.C. § 185.[3] A motion to dismiss is directed to the second claim. Pursuant to Fed.R. Civ.P. 12(b) the court considers matters outside the pleadings and treats the motion to dismiss the second claim as a motion for summary judgment.

[2] On the motions for summary judgment the court considers the defendants' answers to interrogatories and requests for admissions where favorable to plaintiff, the plaintiff's answers to interrogatories and requests for admissions, the affidavit of plaintiff in toto[4] and the affidavits filed on behalf of defendants to the extent they are not controverted. From all of this the following facts appear:

The Crow Reservation was created by treaty on May 7, 1868.[5] The lands here involved were within the reservation. They were allotted to plaintiff while she was still a minor by trust patents issued in 1923 and 1924. These patents provided that the United States would hold the lands in trust for 25 years and at the end of the trust period ". . .

1. 25 U.S.C. § 348 provides: "And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void . . ."

2. Sec. 2. No conveyance of land by any Crow Indian shall be authorized or approved by the Secretary of the Interior to any person, company, or corporation who owns at least six hundred and forty acres of agricultural or one thousand two hundred and eighty acres of grazing land within the present boundaries of the Crow Indian Reservation, nor to any person who, with the land to be acquired by such conveyance, would become the owner of more than one thousand two hundred and eighty acres of agricultural or one thousand nine hundred and twenty acres of grazing land within said reservation. Any conveyance by any such Indian made either directly or indirectly to any such person, company, or corporation of any land within said reservation as the same now exists, whether held by trust patent or by patent in fee shall be void and the grantee accepting the same shall be guilty of a misdemeanor and be punished by a fine of not more than $5,000 or imprisonment not more than six months or by both such fine and imprisonment.

The classification of the lands of such reservation for the purpose of allotment and the allotment thereof shall be made as provided in the Act of Congress approved June 25, 1910 (Thirty-sixth Statutes at Large, page 859), which classification with any heretofore made by authority of law as to lands heretofore allotted shall be conclusive, for the purposes of this section, as to the character of the land involved.

Act of June 4, 1920, ch. 224, 41 Stat. 751.

3. "Whenever any Indian, being a member of any band or tribe with whom the Government has or shall have entered into treaty stipulations, being desirous to adopt the habits of civilized life, has had a portion of the lands belonging to his tribe allotted to him in severalty, in pursuance of such treaty stipulations, the agent and superintendent of such tribe shall take such measure, not inconsistent with law, as may be necessary to protect such Indian in the quiet enjoyment of the lands so allotted to him. R.S. § 2119."

4. On a trial on the merits the plaintiff might not be able to prove the facts stated in her affidavit and some of the inferences which the court draws from the affidavit might be unfounded.

5. 15 Stat. 649 (1868).

convey the same by patent to said Indian in fee, discharged of said trust and free from all charges and encumbrances whatsoever."

Plaintiff's father managed the land for her for some years. Matt Tschirgi[6] leased the land from plaintiff's father and later leased it through the Indian agency. On April 12, 1949, plaintiff was placed on the list of competent Crow Indians under the authority of the Crow Indian Allotment Act.[7] When plaintiff was declared to be competent she undertook the leasing and increased the rental from 14.23 cents per acre to 50 cents per acre. Tschirgi took advantage of the plaintiff's need for money and utilized a scheme prevalent on the reservation whereby leases were made for five years with rentals payable in whole or in part in advance. When the advance payments had been spent the white ranchers, including Tschirgi, were then in a position to apply economic pressure upon the Indians to obtain future concessions. Tschirgi's purpose was to obtain the land or the use of it for as little as possible and without regard for the values involved. In 1955 at a time when plaintiff needed money Tschirgi refused to advance any except on the condition that plaintiff apply for a fee patent. Upon her agreement to apply he loaned her $100.00.

On February 25, 1955, plaintiff applied for a fee patent. Tschirgi instructed plaintiff as to all of the representations that should be made to the Indian agency in order to obtain the fee patent, and she followed his instructions.

On May 21, 1955, she entered into a written contract to sell the land to Antler Land for $7280.00. A portion of the purchase price was a credit on advances previously made, and a sum of $570.00 was advanced on the date of the contract. At the time of the execution of the contract Tschirgi promised that he would, notwithstanding the written contract which called for a purchase price of $7.00 per acre, pay plaintiff whatever the appraised value of the land turned out to be. On August 23, 1955, the land was appraised at $10,400.00.

The application for a fee patent was approved after an investigation, and on October 3, 1955, a fee patent dated September 19, 1955, was delivered to plaintiff who on that date issued her receipt for it. On October 6, 1955, she executed and delivered a warranty deed to Antler Land. Plaintiff received $3,711.00 in cash. The balance of the purchase price was accounted for by the items of advances mentioned in the contract, including a deduction for prepaid lease rentals.

Before plaintiff executed the deed she asked Tschirgi what the appraised value was and Tschirgi told her that the appraised value was unimportant because she was bound by the contract which she had signed. Following the execution of the deed plaintiff determined that the appraised value was $10.00 per acre and asked Tschirgi for the additional money. He refused.

So far as the record here shows the only false statement made in the application for the patent was that no person had asked plaintiff to apply for a patent in fee. This false representation was made because Tschirgi advised plaintiff that the patent would not be issued if he were shown to be involved. As previously noted the contract to sell was dated May 1955, and the fact of its existence was not reported to the Indian agency although the application previously filed in February 1955 had stated that there were no contracts to sell. The application did state that the purpose for seeking the fee patent was to enable plaintiff to sell the land. There is nothing in the records of the Bureau of Indian Affairs which indicates that Tschirgi himself made any representations relative to the patent application.

The patent and deed were placed of record as of October 14, 1955. On the

6 Matt Tschirgi was the alter ego of Antler Land, and his acts are treated as the acts of Antler Land in this opinion.

7. 41 Stat. 755 (1920).

date of the conveyance Antler Land was the owner of more than 1,920 acres of grazing land within the Crow Indian Reservation and all of the successors in interest of Antler Land (except Murtha, trustee, the mortgagee) were likewise the owners of in excess of 1,920 acres of reservation lands at the time they acquired their interests in the land.

[3] In the patent application plaintiff represented that she was competent and gave references to persons who could and did vouch for her competence. The finding of competency is not one merely implied from the issuance of the fee patent but is a considered finding made by the Superintendent of the Reservation and approved by the Area Director.[8] It is not claimed that there were misrepresentations made in the application proceedings which related to the issue of plaintiff's competency and plaintiff does not now assert that she was incompetent either in 1949 when first placed on the competent rolls or in 1955 when the patent issued.

[4-6] It is my opinion, based on the facts I am obliged to assume in considering the motion for summary judgment, that the deed from plaintiff to Antler Land was voidable on the first (ordinary fraud) and second (violation of 25 U.S.C. § 348) theories presented and void on the third (violation of Section 2 of Act of June 4, 1920, 41 Stat. 751).

With respect to the first theory—that of fraud as it relates to the validity of the deed—there may be a genuine issue of material fact and it cannot be held that the defendants are entitled to a judgment on that issue as a matter of law.

As to the second theory:

[7-9] The contract of May 21, 1955, made before the issuance of the trust patent, was void. The existence of the contract did not, however, prevent the plaintiff and Tschirgi from dealing with the land after the issuance of the fee patent,[9] provided that there was a new meeting of the minds and that a subsequent deed resulting from those dealings was not a product of the contract. If as claimed here Tschirgi exerted economic pressure upon plaintiff to secure a contract in violation of the congressional policy expressed in 25 U.S.C. §§ 348 and 349[10] and then after the issuance of the fee patent Tschirgi secured a deed by misrepresentations or by reason of the mistaken belief of plaintiff that she was obliged to perform the contract, then the deed is the illegal fruit of an illegal contract. In short, if it is shown as a fact that the contract was a factor inducing the execution of the deed, the deed was voidable.

As to the third theory:

The original deed conveying the land to Antler Land was accepted by Antler Land in violation of Section 2 of the Crow Act and was void. Defendants seriously urge that Section 2 relates only to conveyances of trust lands. The report of the conference committee indicates that the purpose of Section 2 of the Crow Act was to prevent any one person from accumulating large holdings on the reservation. Thus the statement of the House managers accompanying a conference committee report said ". . . it is not thought to be either good public policy or for the best interests of the Indians to permit any one person, firm or corporation to acquire any great acreage of the land. . . ."[11]

8 The authority of the Superintendent and the Area Director are delineated by 25 C.F.R. § 121.2 (1972) and Commissioner's Order 551, §§ 3 and 4, 16 Fed. Reg. 2939 (1951).

9 Andreas v. Henderson, 160 F.Supp. 252 (S.D.Cal.1958).

10 The contract here in effect made the land liable for debts incurred prior to the issuance of the fee patent in violation of the policy expressed in 25 U.S.C. § 349 as follows: ". . . and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent. . . ."

11 H.R.Rep.No.1043, 66th Cong., 2d Sess. 3-4 (1920).

The same thought is expressed elsewhere in the legislative history.[12] Section 2 poorly effectuates this legislative purpose because it did not absolutely prohibit large holdings on the reservation in that it forbade only the initial conveyances by or on behalf of the Indians. Thus if corporations A through J inclusive each made an independent purchase of 920 acres of Crow lands and then corporations A through I all lost their lands on mortgage foreclosures, the act did not prohibit corporation J from purchasing at the foreclosure sales and accumulating in this manner 9,200 acres of Crow land. Even so, if the purpose was to prohibit large holdings there was no reason to distinguish between conveyances made or approved by the Secretary of the Interior of trust lands and conveyances by the Indians of fee lands the effect in terms of size of the holdings was the same in either case.

Certainly the first sentence, "[n]o conveyance of land by any Crow Indian shall be authorized or approved by the Secretary of the Interior," does relate to conveyances required to be approved by the Secretary. But the second sentence, "[a]ny conveyance by any such Indian," relates to conveyances by Indians. The words "such Indian" in the second sentence relate back to the words "Crow Indian" in the first sentence. The fact that the first sentence deals with Secretarial approval does not require that the words "Crow Indian" appearing in the first sentence and adopted by the word "such" in the second sentence be modified in the adoption by the addition of the words "whose land is in trust status." It does less violence to the language of Section 2 to hold that the first sentence relates to the Secretary of the Interior and the second sentence relates to Crow Indians than to hold that the words "any conveyance by any such Indian" do not mean *any* conveyance but only conveyances of trust land.

The words "whether held by trust patent or by patent in fee" make it impossible to relate the second sentence of Section 2 to trust lands only. Defendants urge that these words somehow refer to the grantee purchaser's title. As to grantees who are white persons or corporations the words "whether held by trust patent" simply have no meaning because a white grantee would never hold by a trust patent. If we eliminate the descriptive words in the second paragraph it reads: "Any conveyance by any such Indian made . . . of . . . land . . . whether held by trust patent or by patent in fee shall be void." On such reading it is apparent that the "whether held" clause relates to the word "land."

[10] Defendants likewise urge that to apply Section 2 of the Crow Act to patent-in-fee lands puts Section 2 in conflict with that part of 25 U.S.C. § 349 which reads as to patent-in-fee lands ". . . and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed. . . ." In my opinion the effect of Section 2 of the Crow Act was to limit the power of a buyer to buy. The Indian was not forbidden to sell; the penalty was directed solely at the buyer. It is true that Section 2 of the Crow Act did limit the market for Indian land to small landowners and big ones willing to gamble, but it did not place a restriction on the power of the Indian to sell or encumber his land. Many laws limit the capacity of persons and corporations to own land. Such limitations appear in connection with federally financed irrigation districts, aliens, and corporate powers. Such laws relate to the capacity to buy and own, not to the capacity of an owner to sell. It cannot be said therefore that Section 2 of the Crow Act, which limited the capacity of buyers to acquire Indian lands, placed a restriction as to sale or encumbrance of the lands contrary to 25 U.S.C. § 349.

[11] It is my opinion that the rights which plaintiff had to avoid her deed on the ground of fraud and because of the

12. H.R.Rep.No.789, 66th Cong., 2d Sess. (1920).

violation of 25 U.S.C. § 348 and the right, if she had any right,[13] to avoid the deed by reason of the violation of Section 2 of the Crow Act are all barred by the Montana Statutes of Limitations.

The General Allotment Act throughout its history[14] has and the Crow Act does distinguish the competent from the incompetent Indian and the trust lands from the fee lands. State law controls here because Congress has explicitly said that it does. The language of 25 U.S.C. § 349 is ". . . when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State . . .".[15]

The patent exists. It has not been cancelled.

[12 14] Plaintiff argues that the United States might bring an action on plaintiff's behalf to cancel the patent and that state limitations would not bar such an action. It is not necessary to decide what right the United States might have in this case to sue on behalf of the plaintiff because the United States not only has not done so, but has refused to do so. For very substantial reasons the plaintiff may not, by joining the United States as a party defendant, force the United States to accept the role of party plaintiff or equate her rights with the rights which the United States might assert did it choose to assert them. The determination that the plaintiff was competent and the decision to issue her a fee patent were executive decisions made for the purpose of ending the trusteeship. The decision carried out an apparent congressional policy to put Indians into the mainstream of American life when competent to manage their own affairs. The issuance of the fee patent had a broader effect[16] than merely to free plaintiff to sell her land—it freed the United States from its trustee duties and altered the relationship of the land and plaintiff to the State of Montana. Whether the United States should, assuming a right to do so, now bring an action to set aside those executive decisions by cancelling the patent and restoring the plaintiff to her dependent status poses an executive problem to be answered in the exercise of

13. This opinion does not decide whether an Indian who sold to a buyer ineligible to take lands by reason of Section 2 of the Crow Act may bring an action to recover the land. In somewhat analogous situations grantors who have been paid by a grantee lacking power to take are not permitted to recover the thing sold. *See* Abrams v. State of Washington, 45 Wash. 327, 88 P. 327 (1907); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 3 L.Ed. 453 (1812); Craig v. Radford, 16 U.S. (3 Wheat.) 594, 4 L.Ed. 467 (1818), all involving aliens; and Fritts v. Palmer, 132 U.S. 282, 10 S.Ct. 93, 33 L.Ed. 317 (1889); Benedict v. Bd. of Comm'rs of Lincoln County, 161 Okl. 50, 17 P.2d 454 (1932); Texas Co. v. State, 198 Okl. 565, 180 P.2d 631 (1947); Kerfoot v. Farmers' and Merchants' Bank, 218 U.S. 281, 31 S.Ct. 14, 54 L.Ed. 1042 (1910); Long v. Georgia Pac. R.R., 91 Ala. 519, 8 So. 706 (1891); Parish v. Wheeler, 22 N.Y. 494 (1860), all dealing with corporations which for some reason lacked a power to take.

Pointing in a different direction, however, the cases dealing with statutes which make any conveyance of land void may be thought to be persuasive in the interpretation of Section 2 of the Crow Act, which makes conveyances to certain persons void. *See* Heckman v. United States, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820 (1912) (dictum); Gerard v. United States, 167 F.2d 951 (9th Cir. 1948); Columbe v. Wilson, 29 S.D. 49, 135 N.W. 668 (1912).

14. Act of Feb. 8, 1887, Ch. 119, § 5, 24 Stat. 389-390; Act of May 8, 1906, Ch. 2348, 34 Stat. 182, now codified as 25 U.S.C. §§ 348 and 349.

15. *See* Larkin v. Paugh, 276 U.S. 431, 48 S.Ct. 366, 72 L.Ed. 640 (1928); Dickson v. Luck Land Co., 242 U.S. 371, 37 S.Ct. 167, 61 L.Ed. 371 (1917); United States v. Waller, 243 U.S. 452, 37 S.Ct. 430, 61 L.Ed. 843 (1917); Bonds v. Sherburne Mercantile Co., 169 F.2d 433 (9th Cir. 1948).

16. *See* Montana Enabling Act, Act of Feb. 22, 1889, § 4, 25 Stat. 676; and Ordinance No. 1, Mont.Const., R.C.M.1947, Vol. 1, pt. 1, p. 328; Montana Power Co. v. Rochester, 127 F.2d 189 (9th Cir. 1942).

the wide discretion vested in the Attorney General of the United States.[17] The question of whether the United States should bring such an action or should leave the fee patent Indian to the remedies afforded her by private litigation under state law involves considerations different from the issues to be resolved in the lawsuit itself. *See* United States v. Minnesota, 270 U.S. 181, 46 S.Ct. 298, 70 L.Ed. 539 (1926); Smith v. United States, 375 F.2d 243 (5th Cir. 1967). An attorney general might in his discretion conclude that Indians should not slip in and out of the trust status at the will of the Indian, that an Indian who sought a declaration of competency and who does not now claim to have been incompetent, and who if there was fraud leading to the procurement of the patent was a participant in the fraud, should not utilize the energies of the United States to revoke a finding of competency which is not even now said to be incorrect to protect rights which the Indian could have protected in litigation conducted by herself.

The point of all this is that before the United States becomes a plaintiff in a lawsuit an executive decision must be made. It has not been made in this case. Plaintiff, by joining the United States,[18] cannot make that executive decision for the United States, nor can the plaintiff empower this court to make that decision. 28 U.S.C. § 1361 giving the district courts jurisdiction of mandamus actions to compel an officer of the United States to perform a duty owed to plaintiff would not, assuming proper parties, permit the court to compel the exercise of a discretionary duty.[19]

[15] The duty of the United States is said to arise under 25 U.S.C. § 185.[20] This section, enacted in 1862, remains in its initial form. It does cast upon the Indian agents and superintendents a duty to protect Indians in the enjoyment of their allotments. To hold, however, that it imposes a duty in the United States or its agents to litigate all title problems which may be created by an emancipated Indian dealing with lands which as indicated are subject to state law would be to ignore the subsequently enacted laws governing Indians. 25 U.S.C. § 185 does not, in light of the previously quoted language from the General Allotment Act and the Crow Act, continue forever the trusteeship of the United States over the fee lands of emancipated Indians[21] and does not impose a duty in the United States to litigate cases arising out of the dealings by Indians with their patent-in-fee lands.

In short, this is an action brought by a competent plaintiff to enforce individual rights. It is not an action by the United States or the equivalent of an action by the United States. State limitations apply.

The facts bearing upon the adverse possession problem are largely admitted. It is agreed that: the defendants have at all times since October 6, 1955, claimed to be the legal owners of and have continuously occupied, possessed, and used the lands described in the complaint for the agricultural and ranching purposes for which said lands are suitable; have paid all of the taxes legally levied and assessed; have over the period from September 1955 to January 25, 1967, placed of public record, in addition

17. 28 U.S.C. § 515; Sutherland v. International Ins. Co. of New York, 43 F.2d 969 (2d Cir. 1930); Parker v. Kennedy, 212 F.Supp. 594 (S.D.N.Y.1963).

18. To treat this case as an action by the United States it would be necessary to ignore the motion to dismiss filed by the United States Attorney and treat the actions of the plaintiff's counsel as those of the United States. This obviously cannot be done. Sutherland v. International Ins. Co. of New York, *supra*.

19. Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir. 1966); Mollohan v. Gray, 413 F.2d 349 (9th Cir. 1969); United States v. Walker, 409 F.2d 477 (9th Cir. 1969); Dodge v. Nakai, 298 F.Supp. 17 (D.Ariz.1968).

20. *Supra* at n. 3.

21. Montana Power Co. v. Rochester, *supra*.

to the patent, six documents disclosing defendants' claims to all or a part of the lands involved. It appears by an uncontradicted affidavit that the lands were enclosed by a fence. The facts bearing upon the claim of fraud were known by plaintiff as early as 1956, and the other facts were known by the plaintiff as they developed.

[16, 17] Under these circumstances the defendants have acquired a title by adverse possession as against the plaintiff.[22] It is not necessary to decide whether a void deed may constitute color of title[23] because a claim of title not founded upon a written instrument may ripen into a title by adverse possession if as here the requirements of R.C.M. 1947 §§ 93-2510 and 2511 are met.[24]

[18] Plaintiff urges that the Montana Statutes of Limitations should be tolled during the period within which plaintiff was attempting to get the United States to bring this action. The answer to this, as to most of plaintiff's contentions, is that state law does control and there is nothing in the law which tolls limitations on the suggested grounds.

[19] The second claim is, as previously indicated, asserted against the United States under the Federal Tort Claims Act[25] for the failure of the United States to assert on plaintiff's behalf the claims made by her in her first claim in this action. It fails because, first, as previously indicated, there is no duty imposed by 25 U.S.C. § 185 upon the United States to litigate the cases arising out of the dealings of emancipated Indians with fee lands and, second, because in any event the duty to sue could never be anything but a discretionary duty to which the Federal Tort Claims Act does not apply.[26]

It is therefore ordered that a summary judgment be entered denying plaintiff the relief sought under the first and second claims and quieting the defendants' title against the plaintiff. The defendants shall prepare a judgment pursuant to Rule 14(b) of the Rules of this Court.

22. What is said here does not purport to affect the right of the United States to enforce, if it has a right to do so, the policy expressed by Section 2 of the Crow Act, whatever that policy may be.

23. There is some indication that under Montana law it may. Hentzy v. Mandan

A P P E N D I X D

Phoebe Wilson DILLON,
Plaintiff-Appellant,

v.

ANTLER LAND COMPANY OF WYOLA, a Montana Corp., et al., Defendants-Appellees.

ANTLER LAND COMPANY OF WYOLA, a Montana Corp., et al., Defendants-Cross-Appellants,

v.

Phoebe Wilson DILLON,
Plaintiff-Cross-Appellee.

Nos. 72-2176, 72-2205.

United States Court of Appeals,
Ninth Circuit.

Nov. 6, 1974

Action by Indian to set aside her conveyance of Indian land. The United States District Court for the District of Montana, Billings Division, Russell E. Smith, Chief Judge, 341 F.Supp. 734, entered summary judgment in favor of defendants, and plaintiff appealed. The Court of Appeals, McGowern, District Judge, held that (1) the Montana statutes of limitation operated to bar any recovery by plaintiff on her claim that the 1955 conveyance of her land, after she had received a fee patent, could be avoided on the grounds of fraud and for violation of statute applicable to conveyances by Crow Indians, (2) her contention that she was deprived of an opportunity to argue the question of the government's obligation to bring the instant action was contradicted by the record of the proceedings below, (3) issuance of the fee patent freed the United States of its duties and obligations to plaintiff with respect to the land it theretofore held in trust, and (4) federal law does not prohibit the acquisition of fee patent land by adverse possession.

Judgment affirmed

1. Indians ⇐13(10)
Limitation of Actions ⇐2(2)

When land was conveyed to Indian by patent in fee, she became, under statute, subject to the laws of the state in which she resided, namely, Montana; and accordingly, though the 1955 deed of her land was voidable for fraud and on other grounds, her right to avoid the deed, by suit filed 15 years later, was barred by the Montana statutes of limitation. Indian General Allotment Act, §§ 5, 6, 25 U.S.C.A. §§ 348, 349; Crow Indian Allotment Act of 1920, § 2, 41 Stat. 751.

2. Courts ⇐406.6(3)
Federal Civil Procedure ⇐2499

Issue of the alleged duty of the United States to assert action to set aside Indian's deed which was voidable for fraud and for violation of statutes applicable to conveyances by Crow Indians was clearly before the district court, and its disposition of said claim by way of summary judgment against the Indian was thus made in spite of its consideration of her contentions and was neither prejudicial nor erroneous. Indian General Allotment Act, §§ 5, 6, 25 U.S.C.A. §§ 348, 349; Crow Indian Allotment Act of 1920, § 2, 41 Stat. 751; 25 U.S.C.A. § 185.

3. Indians ⇐13(10)

Issuance of fee patent to Indian freed the United States of its duties and obligations to the Indian with respect to the subject land theretofore held in trust by the United States, and defined a new status of the Indian in her relation to the state in which she resided. 25 U.S.C.A. § 185.

4. Indians ⇐22

Federal law does not prohibit the acquisition of fee patent Indian land by adverse possession. Indian General Allotment Act, § 6, 25 U.S.C.A. § 349.

Thomas E. Towe (argued) of Towe, Neely & Ball, Billings, Mont., for plaintiff-appellant.

Cale Crowley (argued), of Crowley, Kilbourne, Haughey, Hanson & Gallagher, Billings, Mont., Glen R. Goodsell, Atty. (argued), Land and Natural Resources Div., Dept. of Justice, Washington, D. C., for defendants-appellees.

Before CHAMBERS and KOELSCH, Circuit Judges, and McGOVERN,* District Judge.

McGOVERN, District Judge:

In dispute here is title to 1,040 acres of grazing land on the Crow Indian Reservation in the State of Montana. Appellant Phoebe Wilson Dillon, then a minor Crow Indian, was awarded this land by trust patents in 1923 and 1924. Her father managed the land until she became of age. Not long after Appellant received her allotments, the land was leased to Matt Tschirgi, who later incorporated under the name of Antler Land Company. In 1949, Mrs. Dillon, at age 34, applied for and received competency status and undertook her own lease negotiations. She immediately increased her income from 14.32 cents per acre to 50 cents per acre.

On February 25, 1955, Mrs. Dillon applied for a fee patent. The application stated that the purpose was to enable her to sell the land. So far as the record shows, the only false statement made in the application for patent was that no person had asked Appellant to apply for patent in fee. This false representation was allegedly made because Tschirgi advised Appellant that the patent in fee would not be issued if he were shown to be involved.

On May 21, 1955, Appellant agreed in writing to sell the land to Antler Land Company for $7,280 if and when she received the patent in fee, although such a contract for the sale of trust land is specifically prohibited by 25 U.S.C. § 348. The fee patent application was approved by the Bureau of Indian Affairs on October 3, 1955, and a fee patent dated September 19, 1955, for the 1,040 acres was delivered to Appellant. On October 6, 1955, Appellant executed and delivered a warranty deed to Antler Land Company, and received $3,711.00 in cash. The balance of the $7,280 purchase price was accounted for by the items of advances mentioned in the May 21, 1955 contract, including a deduction for prepaid lease rentals. 25 U.S.C. § 349 mandates that patent in fee land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent. The patent in fee and deed were recorded on October 14, 1955.

Additional facts disclosed at the trial indicate that Tschirgi assured Appellant on May 21, 1955 that if the Bureau of Indian Affairs appraised her land at more than $7 per acre, he would pay her the dollar difference. On August 23, 1955, the land was appraised at $10 per acre, but Tschirgi refused to pay her the $3 difference per acre.

On the date of the conveyance, Antler Land Company was the owner of more than 1,920 acres of grazing land within the Crow Reservation and all the successors in interest of Antler Land Company (except Trustee Murtha) were likewise owners of more than 1,920 acres of reservation land at the time they acquired interest in the subject land.

On July 20, 1970, approximately fifteen years after the conveyance, Mrs. Dillon filed a complaint in United States District Court for the District of Montana against the Antler Land Company, the Little Horn Land and Livestock Company, the Union Bank and Trust Company as Executor of the Estate of Bertha Tschirgi, Rex Hibbs as Executor of the Estate of F. M. Tschirgi, Francis J. Murtha as Trustee for Trustees of Central States, the Southeast and Southwest Areas Pension Fund, and the United States of America.

The complaint states two claims for relief. First, Mrs. Dillon seeks a decree

*The Honorable Walter T. McGovern, United States District Judge for the Western District of Washington, sitting by designation.

adjudging the contract of May 21, 1955, and the deed of October 6, 1955, null and void, and quieting title to the land in herself or in the United States as her trustee and to recover rents and profits. In support of her first claim, three theories are urged: (1) Fraud that vitiates the patent in fee from the United States to Appellant and the deed from her to Antler Land Company. (2) That while the land was in trust status, Appellant executed a contract to convey it in contravention of 25 U.S.C. § 348; and (3) That Antler Land Company on the date of delivery owned lands in excess of the acreage limitations contained in Section 2 of the Crow Indian Allotment Act of 1920, 41 Stat. 751. Motions for Summary Judgment were directed to the first claim.

In her second claim, Mrs. Dillon seeks to recover $33,000.00, the alleged current fair market value of the land, in damages, under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), alleging that agents of the United States, by refusing to take action in her behalf with respect to the 1,040 acres, breached the duties enjoined on them by 25 U.S.C. § 185. Pursuant to Rule 12(b) F.R.Civ.P., the District Court considered the answer of the United States as a Motion for Summary Judgment.

The District Court held that the October 6, 1955 deed was voidable on the first and second theories advanced, and also void under Section 2 of the Crow Act of 1920 as applied to the purchaser. It further held, however, that the rights which Appellant had to avoid her deed on the grounds of fraud and because of the violation of 25 U.S.C. § 348, and the right, if she had any right to avoid the deed by reason of the violation of Section 2 of the Crow Act of 1920, were all barred by the Montana Statutes of Limitation, and that in the instant circumstances, Appellees have acquired title by adverse possession as against Appellant. Finally, the Court ruled that Appellant's second claim must also fail because there is no duty imposed by 25 U.S.C. § 185 upon the United States to litigate the cases arising out of the dealing of emancipated Indians with fee lands, and, because in any event, the duty to sue could never be anything but a discretionary duty to which the Federal Tort Claims Act does not apply.

Appellant Dillon presents three assignments of error: (1) The holding of the District Court that the Montana Statutes of Limitation operate herein to bar any recovery by her; (2) The granting by the District Court of Summary Judgment in favor of the United States on Appellant's second claim, *sua sponte*, without notice to Appellant and without a reasonable opportunity to present material pertinent thereto as required by Rule 12(b); and (3) The conclusion of the District Court that any duty to sue imposed on the United States by 25 U.S.C. § 185 could never be anything but discretionary and therefore outside the purview of the Federal Tort Claims Act.

Appellees assign as error the holding that the subject deed of October 6, 1955, was void under Section 2 of the Crow Act of 1920.

[1] This appeal raises troublesome questions, but that Montana law governs with respect to Appellant's property rights herein is not one of them. 25 U.S.C. § 349 relied on by the District Court in holding that Appellant's first claim is barred by the Montana Statutes of Limitation[1] could scarcely be more explicit in this respect. It provides:

"At the expiration of the trust period and *when the lands have been conveyed to the Indians by patent in fee*,

1. R.C.M. § 93-2504 No action for the recovery of real property, or for the possession thereof, can be maintained, unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within five years before the commencement of the action.

R.C.M. § 93-2607 provides for a two-year limitation period.

Subsection (4). An action for relief on the ground of fraud or mistake, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

as provided in section 348 of this title, then each and *every allottee shall* have the benefit of and *be subject to the laws, both civil and criminal, of the State or Territory in which they may reside*; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided* further, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: . . . " (Italic ours)

Appellant's argument and authorities on this issue consistently represent the natural concern of Congress and the courts to protect Indians in the possession, enjoyment and authorized conveyance of restricted lands but the acreage here involved falls outside that category. It is the subject of a patent in fee, the effect of which was to remove restrictions on its alienation and provide that the allottee should have the benefit of and be subject to the laws of the State of Montana. Appellant's contention that Section 349 is to be read to mean that only lands conveyed after the expiration of the trust period are expressly subject to state law is without merit.

In the trial court and here, Mrs. Dillon makes a strong attack on the validity of her deed to Antler Land Company. That argument also misses the point. The judgment which we affirm was not that Appellant's case against her deed lacked merit, but rather, that it is barred for lack of prosecution.

In her second claimed assignment of error, Appellant points out that the Defendant United States answered the Complaint, *inter alia*, in the language of Rule 12(b)(6). Defendants other than the United States, in a Separate Answer and a second Separate Answer and Cross-Complaint, denied Plaintiff Dillon's claims for relief against the United States or anyone else, denied that the Federal Tort Claims Act encompassed the claim for relief alleged, and moved for dismissal. The District Court treated the Motion to Dismiss the second claim as a Motion for Summary Judgment, and thereupon granted the Motion. This the Appellant assigns as error, charging that the action of the District Court deprived Appellant of notice and an opportunity to be heard with respect to its second claim, as provided for in the last sentence of Rule 12(b).

[2] Appellant's second claim alleged a duty on the part of the United States to assert her first claim on her behalf. Her contention that she has been deprived of the opportunity to argue the question of the Government's obligation to bring this action is contradicted by the record of the proceedings below. The issue was clearly before the District Court. In her original Memorandum and her Supplemental Citations of Authority to the trial court, Appellant developed at length her contentions with respect to federal jurisdiction, the responsibility of the United States to its Indian wards, and her exemption from state statutes when bringing an action which the United States as trustee allegedly had an "absolute duty" to bring under 25 U.S.C. § 185. The District Court's disposition of Appellant's second claim by way of Summary Judgment was made in spite of those contentions and was neither prejudicial nor erroneous.

Appellant's third assignment of error attacks the trial court ruling by summary judgment against her second claim on the grounds that 25 U.S.C. § 185, which provides:

"Whenever any Indian, being a member of any band or tribe with whom

> the Government has or shall have entered into treaty stipulations, being desirous to adopt the habits of civilized life, has had a portion of the lands belonging to his tribe allotted to him in severalty, in pursuance of such treaty stipulations, the agent and superintendent of such tribe shall take such measures, not inconsistent with law, as may be necessary to protect such Indian in the quiet enjoyment of the lands so allotted to him. R.S. § 2119."

imposes no duty upon the United States to litigate the cases arising out of the dealings of emancipated Indians with fee lands, and, secondly, because in any event, the duty to sue could never be anything but a discretionary duty to which the Federal Tort Claims Act does not apply. The issue underlying this assignment of error is well stated by Appellant: Does 25 U.S.C. § 185 impose a mandatory duty on the United States to litigate cases arising out of the dealings of emancipated Indians with fee lands, the breach of which is actionable under the Federal Tort Claims Act"

[3] Standing against the contentions of Appellant on this issue is the logic and the weight of authority in support of the proposition adopted by the trial court, namely, that issuance of the fee patent freed the United States from its duties and obligations to the Indians with respect to the lands it theretofore held in trust and defined the new status of those Indians in their relation to the State. See Montana Power Company v. Rochester, 127 F.2d 189, 192 (9th Cir., 1942). We concur in the ruling of the trial court.

[4] Appellant does not separately assign as error the holding of the District Court that Appellees under the instant circumstances have acquired title as against Appellant to the subject land by adverse possession. Instead, Appellant's arguments on the question of adverse possession are stated in support of reasons advanced against the applicability of the Montana Statutes of Limitation. Indeed, Appellant's position with respect to adverse possession necessarily and in fact raises the same fundamental questions raised by her position on the applicability of the Montana Statutes of Limitation, to wit: Does federal law in these circumstances prohibit the acquisition of fee patent Indian land by adverse possession? We hold that it does not. 25 U.S.C. § 349 not only authorizes but requires the application of Montana law in the instant circumstances and, therefore, the issues relative to adverse possession are resolved accordingly.

Finally, Appellees appeal from the ruling that the deed of October 6, 1955 was void as in violation of Section 2 of the Crow Act of 1920.

The District Court held that pursuant to Section 2 of the Crow Act of 1920, Antler Land Company on October 6, 1955, already in possession of Crow land in excess of 1,920 acres, was ineligible to take the 1,040 acres which was the subject of the warranty deed herein. We note that the District Court in its Opinion and Order expressly declined to decide whether an Indian who sold to a buyer ineligible to take land by reason of Section 2 of the Crow Act may bring an action to recover the land. Having otherwise disposed of the case on appeal, we, too, decline to needlessly pass on such issue.

The judgment of the trial court is affirmed.

A P P E N D I X E

APPENDIX E

IN THE UNITED STATES COURT OF CLAIMS

No. 410-77

PHOEBE WILSON DILLON,
Petitioner,
-vs-
UNITED STATES OF AMERICA,
Respondent.

AFFIDAVIT

STATE OF MONTANA)
) ss.
County of Yellowstone)

I, PHOEBE WILSON DILLON, being first duly sworn, depose on oath and say that:

1. I am an enrolled member of the Crow Tribe, Montana. I was awarded Allotment No. 3636 by virtue of a Trust Patent, a copy of which is shown as Affidavit's Exhibit "1" and a Homestead Allotment, a copy of which is shown as Affidavit's Exhibit "2".

2. I was born on December 7, 1914, and the allotments were obtained when I was a small child. My father picked the land for me and made the necessary arrangements. Until I was approximately eighteen (18) years old, my father took care of all of the management of my Allotment. For the first several years, my father used the land himself in his own agricultural operation. Then, he started leasing it to Matt Tschirgi. Until Robert Yellow Tail became Superintendent shortly after I became of age, my father and I handled the lease negotiations ourselves and received the money directly from Matt Tschirgi. We leased the land to Matt Tschirgi for between 10 cents and 15 cents per acre. The lease payments were made once each year, but occasionally we would see Matt Tschirgi in between times and receive some money. When Robert Yellow Tail became Superintendent, the Indian leasing became unitized and the

WE, BALL,
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office took over all of the leases and we received our lease payments thereafter from the Superintendent's office.

3. On December 31, 1948, I filed a Petition for Declaration of Competency Status. I was receiving only One Hundred Forty-Nine and No/100 Dollars ($149.00) a year for my One Thousand Forty (1,040) acres or approximately 14.32 cents per acre and I felt my land was worth more. My competency status was approved and I gained the right to negotiate my own leases. Within two (2) weeks after my competency status was approved on April 12, 1949, I negotiated a lease of Seven Hundred Twenty (720) acres with the Reservation Ranchers Association for Fifty Cents ($.50) per acre per year without a deduction for interest. Most leases were negotiated for five (5) years at a time and all of the rent was paid in advance. The white tenants had devloped a pattern of deducting from the rent payment interest at the rate of eight percent (8%) per annum on each year's payment paid in advance. I negotiated this lease with James Stanton and I demanded that no interest allowance be deducted from my total payment.

4. I then visited Matt Tschirgi to see if he wanted to lease the remaining Three Hundred Twenty (320) acres on the same terms. The land had been leased in the same portions to the same persons while the office was handling the lease before I became competent for this purpose. Matt Tschirgi refused and when I said I would lease it to the Reservation Ranchers Association, he agreed to reconsider, but wanted me to wait for a few days. Upon leaving Matt Tschirgi, we proceeded immediately to see Mr. Stanton. When we arrived, I told Mr. Stanton that I was sure Matt Tschirgi would soon come to visit him and try to talk him out of the 50 cents per acre lease. While we were there, Matt Tschirgi arrived and I overheard him tell Mr. Stanton, "you are a damn fool to give her that much money." By this time the lease was already consumated with Mr. Stanton and Mr. Tschirgi could not do anything about it.

LL,
ACKEY

5. After about four days, Matt Tschirgi's son, Frank, came to see us. He suggested that they were prepared to go along with us and lease the remaining Three Hundred Twenty (320) acres at 50 cents per acre instead of the low rental they had been paying. They still wanted to deduct eight percent (8%) interest on the future rental payments made in advance, but I refused and threatened to negotiate with Mr. Stanton for the remaining Three Hundred Twenty (320) acres unless they omitted their interest deduction from the lease. They finally agreed to my terms and I signed the lease accordingly. I received all of the payment for the next five (5) years at the same time.

6. During the Fall of 1949, I needed glasses for my girls and I went to see Matt Tschirgi. Matt Tschirgi said he would loan me Eighty-five and No/100 Dollars ($85.00) but suggested that I should apply for a fee patent for my land. He said I would receive more money if I had a patent fee. Further, he said he would help me find some land near my husband's ranch in Wyola which I could purchase with the proceeds from a sale of my One Thousand Forty (1,040) acres to him. He explained how I should obtain an application form at the Superintendent's office. He said he would pay me for the land at a value equal to, if not in excess of, the appraised value according to the B.I.A. appraisal. He further told me what to say on the application. For example, he told me I should state in the application that I wanted to trade this land for land closer to my husband's ranch. He instructed me not to say anything about his participation in the transaction and he specifically told me not to give his name if I was asked who will buy the property because if I did, the application would never be approved. Some time later, when I went to see Mr. Tschirgi about some more money, he informed me that my application had not been approved. He had the information before we did.

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& MACKEY
AVENUE NORTH
ONTANA 59101
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7. Each year, or every two years, according to the prevailing custom in the area, a new five (5) year lease was negotiated by cancelling the old lease and entering into a new lease and paying the rent for the fifth year, or the fourth or fifth years in the future. In April, 1951, my lease with Matt Tschirgi was cancelled and a new lease for five (5) years was made and I received 30 cents per acre for the fourth and fifth years of the new lease. During the next several years, my sisters and brother who held allotments to most of the land surrounding my Allotment No. 3636 obtained patent fees to their land and sold it to Matt Tschirgi or to others who sold to Matt Tschirgi or his corporations.

8. In February of 1955, I had borrowed Seventy-Five and No/100 Dollars ($75.00) as an advance on the next year's lease payment. My husband had surgery in the Miles City Veterans Hospital and I needed money badly. On February 14, 1955, Matt Tschirgi refused any further advances unless I agreed to apply again for a patent in fee. I agreed and he lent me One Hundred and No/100 Dollars ($100.00). He told me to go to the Superintendent's office to fill out an application and again, he told me what to say on the application. Again, he cautioned me not to mention who was going to purchase the land once I received a fee patent. Before mailing in the application, I showed it to Matt Tschirgi on February 28, 1955, and he loaned me an additional One Hundred and No/100 Dollars ($100.00) on that date. On March 28, 1955, he made an additional advance of Six Hundred and No/100 Dollars ($600.00). Two Hundred Fifty and No/100 Dollars ($250.00) was advanced on April 27, 1955, and prior to May 21, 1955, I received an additional Five Hundred Seventy-Five and No/100 Dollars ($575.00). At that time, Matt Tschirgi told me it would look better if they signed a contract. He said it was a business deal and it would protect both of us if they had a written contract. Consequently, I signed the contract agreement shown as Exhibit "5" to

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the Affidavit. I received Three Hundred and no/100 Dollars ($300.00) on the day I signed as an inducement to sign. The contract contained a price of Seven and No/100 Dollars ($7.00) per acre but Matt Tschirgi assured me that he would make up the difference if the appraisal was higher.

9. Sometime during the month of July, when I sought additional advances from Matt Tschirgi, Matt Tschirgi asked me if I had received my patent fee. I told him I had not and he suggested I write a letter to Secretary McKay in Washington, D.C. He gave me the address and wrote on a sheet of paper the general outline of what I should say and told me to write the letter in my own words. I took his outline and address home and did just what he said. The letter I wrote is shown as Affidavit Exhibit "3". All comments in this letter relating to my knowledge of the valuation of my land was suggested by Matt Tschirgi.

10. Prior to October 6, 1955, I had not been showed a copy of the appraisal done on my land. Upon receiving the patent, I called Matt Tschirgi from town and as a result of that conversation, I went to see him the next day. At that time we went through the various papers and I signed the necessary papers at his request. I again insisted on the full appraised value, but he said that I could not require the full appraised value now because I had signed a contract and was bound by this contract. I asked him about his promise to pay the appraised value and he said a contract is a contract and it was binding on me. I asked to go to the Crow Office immediately to find out what the appraised value was and he would not go. He said it was not necessary because I was bound by my contract and the appraised value would make no difference at this time. He continued to ignore my request to go to the Crow Agency Office and finally, I went with him to the Bank where he gave me a check. By that time, he had advanced to me Three Thousand Twenty-Nine and 06/100 Dollars

BALL & MACKEY

($3,029.06). In addition, he deducted Five Hundred Forty and no/100 Dollars ($540.00) as a rebate for the lease he had paid me in advance and paid me by check the balance of Three Thousand Seven Hundred Twenty-One and No/100 Dollars ($3,721.00). The payment schedules are shown on the account sheet attached hereto as Affidavit Exhibit "4".

11. Shortly after October 6, 1955, when I signed the papers on the sale of my land to Matt Tschirgi, I asked the Indian Appraiser, Joe Medicine Crow, how much the appraisal on my land came to. He told me it amounted to Ten and No/100 Dollars ($10.00) per acre. I immediately went to see Matt Tschirgi and demanded the difference between the Seven and No/100 Dollars ($7.00) per acre he paid me and the Ten and No/100 Dollars ($10.00) per acre from the appraisal. He informed me that the deal was closed and nothing more could be done at that time. During the latter part of 1955, I went to see the Superintendent, L. C. Lippert, and explained to him that Mr. Tschirgi refused to live up to his agreement to pay the full appraised value of my land. The Superintendent indicated there was nothing he could do but suggested I contact a lawyer.

12. At no time was I told that the contract of May 21, 1955, was not binding on me. In fact, I was forcefully informed that it was binding and I had no choice but to abide by it even after my fee patent was issued.

13. Matt Tschirgi knew the personnel at the Superintendent's office extremely well and I believe that he conspired with them to prevent me from seeing the appraisal on my land until after I had signed the Warranty Deed on October 6, 1955.

14. In 1959, I joined with other Crow Indians to form the Crow Indian Mutual Benefit Association. This Association retained former Field Solicitor Harlow Pease to represent us and Mr. Pease presented to the Justice Department all the cases for testing Section 2 of the Crow Indian Allotment Act of 1920.

BALL, & MACKEY
AVENUE NORTH
ONTARIA 89101
248 7237

My case was one of these cases.

15. This Affidavit is similar in all respects to an Affidavit signed by me on September 30, 1971 in Cause No. 891 of the United States District Court, District of Montana, Billings Division.

Phoebe (Wilson) Dillon
PHOEBE WILSON DILLON

SUBSCRIBED AND SWORN TO before me this 12th day of May, 1979.

Thomas E Dair
Notary Public for the State of MT
Residing at Billings, Montana
Commission Expires: 22 March 1982

(NOTARIAL SEAL)

VE, BALL,
T & MACKEY
H AVENUE NORTH
MONTANA 59101
ONE 248 7337

1095321
9460-23. I.O.
3636

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4—1068

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, a schedule of allotments approved by the Secretary of the Interior has been deposited in the General Land Office, whereby it appears that Phoebe Wilson, an Indian of the Crow Reservation,

has been allotted the following-described land:

The west half of the southwest quarter of Section twenty-five and the east half of Section twenty-six in Township four south of Range thirty-four east of the Montana Meridian, Montana, containing four hundred acres:

NOW KNOW YE, That the **UNITED STATES OF AMERICA,** in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the Land above described, and hereby declares that it does and will hold the Land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian and at the expiration of said period the United States will convey the same by patent to said Indian in fee, discharged of said trust and free from all charge and incumbrance whatsoever; but in the event said Indian dies before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names a patent in fee for said Land, or cause said Land to be sold for the benefit of said heirs as provided by law; and there is reserved from the lands hereby allotted, a right of way thereon for ditches or canals constructed by the authority of the United States. Also reserving to the United States for the benefit of the Crow Tribe, in accordance with the provisions of the Act of Congress of June 4, 1920 (41 Stat., 751), all the coal, oil, gas, or other mineral deposits in the lands above described.

IN TESTIMONY WHEREOF, I, Calvin Coolidge

President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the TENTH day of OCTOBER in the year of our Lord one thousand nine hundred and TWENTY-THREE and of the Independence of the United States the one hundred and FORTY-EIGHTH

By the President: Calvin Coolidge

By [illegible], Secretary,

[illegible]

Recorder of the General Land Office.

RECORDED: Patent Number [illegible]

6—0178

GOVERNMENT PRINTING OFFICE

DEF. EX. 1

AFFIDAVIT
Exhibit "1"

[illegible] I.O.

4-1040

3636

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, There has been deposited in the General Land Office a schedule of allotments duly approved by the Secretary of the Interior, whereby it appears that Phoebe Wilson, an Indian of the Crow Reservation, Montana, pursuant to the provisions of the act of Congress of June 4, 1920 (41 Stat., 751), has been allotted as a HOMESTEAD the lands described as follows:

The east half of the southwest quarter and the southeast quarter of Section twenty-five and the north half and the north half of the southeast quarter of Section thirty-six in Township four south of Range thirty-four east of the Montana Meridian, Montana, containing six hundred forty acres, according to the official plat of survey of said lands on file in the General Land Office:

NOW KNOW YE, That the United States of America, in consideration of the premises, has allotted, and, by these presents, does hereby allot unto the said Indian the above-described lands as a HOMESTEAD, subject to all the provisions, conditions, limitations, and restrictions contained in said act of June 4, 1920, and hereby declares that it does and will hold the land so allotted in trust for the sole use and benefit of said allottee for the period of twenty-five years from date hereof, or until the death of said allottee, and that at the expiration of said period the United States will convey to said Indian or to her heirs, as the case may be, the fee to said lands discharged of said trust. Should said Indian die before the expiration of said twenty-five years then the Secretary of the Interior shall determine the heirs of said decedent and either issue to them a patent in fee for said lands or cause the same to be sold for their benefit as provided by law. There is hereby reserved from the lands so allotted a right of way thereon for ditches and canals constructed by the authority of the United States. There is also hereby reserved, for the benefit of the Crow Indian Tribe, all the coal, oil, gas, or other mineral deposits in the above-described lands.

IN TESTIMONY WHEREOF, I, Calvin Coolidge,

President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the TWENTY-SIXTH day of JANUARY in the year of our Lord one thousand nine hundred and TWENTY-FOUR and of the Independence of the United States the one hundred and FORTY-EIGHTH

By the President: Calvin Coolidge

By [illegible] Secretary,

[illegible] Recorder of the General Land Office.

[illegible] Patent Number 920168

[illegible] AFFIDAVIT Exhibit "2"

JUL 1 1 1955

Hyala Montana.
July 9, 1955

Mr Douglas McKay. 10e
Sec of Interior
Washington D.C.
Dear Mr Sec McKay.
No doubt your wondering why I am writing you this letter. I applied for a patent of fee, on February 25, 1955 and its been approved of by our Supt. Mr. Lippert, but it seems like they are waiting for word from you to go out and approve those lands before our papers can go through. There's a pile of papers that some of the other Indians have applied for also and these still there at the office. I would think if we can go ahead and make our own leases and take care of our own affairs, I don't see why we can't give the appraisal of our own land. I think I know what the valuation of my land is much better than some one else does. I would like to have some action on the papers so I wont have

350

AFFIDAVIT - Exhibit [illegible]

INTERIOR
JUL 11
BUREAU OF INDIAN AFFAIRS
RECEIVED
JUL 13 1955
9590
Washington, D.C.

to wait forever for that patent of fee. I would like to get something done this summer, I know if you were selling that land yourself so you can invest the money into some more land and live-stock, you wouldn't want to wait for-ever for your papers I'm sure. In my books I think us American Indians are given a raw deal in any direction we turn. It seems like when we want to get something done we don't get an encourgement from our Agency office, our area offices and also, the great Washington D. C.

Sincerely Yours
Mrs. Phoebe (Wilson) Dillon

Let me hear from you soon and let me know how soon I can get something done.

AGREEMENT

This agreement dated this 21st day of May, 1955 between Phoebe Wilson Dillon of Wyola, Montana, party of the first part, and the Antler Land Company, a Montana Corporation, of Wyola, Montana, party of the second part, do hereby agree to the following.

WHEREAS, the party of the first part is applying for a fee patent to the following land:

N½ Section 26, S½ Section 25, N½ Section 26, N½ SE¼ Section 26, Township 4 South, Range 34 East containing 1040 acres more or less situated in Big Horn County, Montana.

WHEREAS, the party of the first part has agreed to sell the above described lands to the party of the second part upon receipt of the fee patent for and in consideration of the sum of Seven thousand, two hundred and eighty and No/100 Dollars ($7,280.00) to be paid as follows:

$800.00 advanced on note dated March 28, 1955
$575.00 advanced on note dated May 21, 1955
Prepaid rentals on lease at time fee patent is received.
Balance of cash to be paid upon receipt of Warranty Deed.

Whereas, the party of the second part has agreed to purchase the above described lands for the Total sum of $7,280.00 less any rentals prepaid, less any monies advanced against the total sum, second party agrees to pay any balance of the purchase price upon receipt of a good and valid title to the above described lands.

In witness whereof, the parties have affixed their signatures the date first above written.

Witnesses:

Robert Thurlwell Jr

Phoebe Wilson Dillon

ANTLER LAND COMPANY

By: W. H. Tschumper
President